

Before the
U.S. COPYRIGHT OFFICE
LIBRARY OF CONGRESS

**In the Matter of Section 1201 Exemptions to
Prohibition Against Circumvention of Technological
Measures Protecting Copyrighted Works**

Docket No. 2014-07

Written Reply Comment of

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Requested Class of Work for Exemption – Proposed Class 4 (Audiovisual Works— Educational Uses –Educational Programs Operated by Museums, Libraries or NonProfits)

Proposed Subclass 4: Proposed Class 4: Audiovisual works – educational uses – educational programs operated by museums, libraries, or nonprofits This proposed class would allow educators and learners in libraries, museums and nonprofit organizations to circumvent access controls on lawfully made and acquired motion pictures and other audiovisual works for educational purposes. This exemption has been requested for audiovisual material made available in all formats, including DVDs protected by CSS, Blu-ray discs protected by AACS, and TPM-protected online distribution services.

I. Commentator Information

Renee Hobbs is a Professor of Communication Studies at the Harrington School of Communication and Media where she directs the Media Education Lab, which provides curriculum materials and professional development education in digital and media literacy education to librarians and non-profit educators across the United States. The American Library Association is a nonprofit professional organization of more than 60,000 librarians dedicated to providing and improving library services and promoting the public interest in a free and open information society. Michelle Ciulla Lipkin is the Executive Director of the National Association for Media Literacy Education (NAMLE), a national membership organization. Gretjen Clausen is the Executive Director of Philly CAM, a public media arts access center in Philadelphia, Pennsylvania. Erin McNeil is the President of Media Literacy Now, a Massachusetts-based non-profit organization. D.C. Vito is the Executive Director of The LAMP, a non-profit media literacy organization in New York City.

II. Overview

Informal learning has been advancing dramatically over the past ten years and with it has come a significant interest in using the power of digital media for learning. When the Institute of Museum and Library Services, the federal agency that supports libraries and museums, developed its mission statement for the 21st century, it stated, “IMLS places the learner at the center and supports engaging experiences in libraries and museums that prepare people to be full participants in their local communities and our global society.” That’s because learning happens everywhere – in libraries, museums, in settlement houses, in housing projects, and in small storefront non-profit organizations all over this country. The non-profit sector is diverse collection of private institutions that mobilizes individual initiative for the common good. There are more than 123,000 libraries and more than 3,000 public, educational and government (PEG) media access centers in the United States.

Libraries have been in the forefront of advancing the digital and media literacy competencies of its patrons. Both libraries, PEG access centers and other media arts non-profit organizations help advance the digital and media literacy competencies of citizens

in and out of schools by providing outlets for community members to get access to technology and learn to use media for self-expression, communication and leadership skills. In many informal learning settings, senior citizens routinely use and create media on a range of issues. PEG channels provide an outlet for unserved or underserved portions of a community, including recent immigrants, people with disabilities, and religious minorities.¹ By offering informal education programs in media and technology and by creating original programming that requires community collaboration, libraries and media arts centers provide vital informal learning experiences that help sustain our democracy. In some cases, people in these settings wish to circumvent encryption in order to use copyrighted content to make new, transformative work. At the present time, educators working in these settings must discourage this practice.

We request an exemption that enables both educators and learners working in all these types of settings to use artifacts of their cultural heritage – classic and contemporary film and other digital media – for these new instructional practices that have the potential to engage, motivate and inspire children and young people who often experience transformative learning experiences in informal settings. Such learning experiences can powerfully activate digital and media literacy competencies, including the ability to access, analyze, evaluate, and create messages in a wide variety of forms. Learners are able to reflect on the social consequences of media in society and take action in the use of information and communication to make a difference in the world. Such purposes involving the use of copyrighted content in education are well-aligned with the goals of copyright law, which is to promote creativity, innovation and the spread of knowledge.²

In these comments, we respond to the arguments of opponents and emphasize that learners and educators need access to high-quality media – in all formats and across all devices – as an essential part of teaching and learning today.

1. Opponents do not recognize that learners’ and educators’ access to and use of high-quality media generally qualifies as fair use. Opponents of our exemptions question whether educational uses of digital media qualify as fair use and they make elaborate arguments about the distinctions between educational use and fair use. We claim that the instructional practices of digital and media literacy, which include the ability to access, critically analyze and create media, are highly likely to be fair uses and that people develop these essential competencies and skills in the classroom through hands-on, minds-on learning. We understand, of course, that not all educational uses are fair uses. The current 2012 exemption limits circumvention to K-12 educators, denying access to copyrighted works in certain formats to learners and educators who work in other settings. But because these currently inaccessible digital works have real value for use by learners, digital and media literacy learning is being stymied. Learners *and* educators in out-of-school contexts must both be able to select, manipulate and have access to the widest variety of meaningful and educationally valuable digital content

¹ Alliance for Community Media (2015). ACM Response to White Paper #6. Retrieved on April 14, 2015 from <http://www.allcommunitymedia.org/wp-content/uploads/ACM-Response-to-White-Paper-6.pdf>

² Crews, K. (1993). *Copyright, Fair Use and the Challenge for Universities*. University of Chicago Press.

available on DVDs, Blu-Ray discs and other high definition content.

2. There is no good reason to legally distinguish between teachers and students in K-12 or higher education and those who teach and learn in non-school settings.

Opponents claim that learners and educators in libraries, museums and non-profit organizations are an unreasonably large and unworkable class. They dismiss and trivialize informal education by putting scare quotes around terms like “learners” and “education.” They point to the limitations on distance learning offered by the TEACH Act, even though this provision of the law only applies to non-profit accredited institutions, and does not limit the ability to claim fair use. It has no bearing on the online educational outreach work of libraries, museums or non-profit organizations. But opponents offer no legal reasoning to justify why learners or educators in libraries, museums or non-profit organizations should be treated as second-class citizens who are not deserving of the fair use rights granted to college and university professors, K-12 teachers, or students in media studies classes. That’s because such distinctions are untenable and would serve to perpetuate educational inequity. For these reasons, we urge the Librarian to grant an exemption that enables educators and learners in informal settings the opportunity to use innovative educational practices of digital and media literacy.

Consider the following example. Wes Anderson, the Oscar nominated director of *The Grand Budapest Hotel*, recently delivered a lecture at the New York Public Library. If he had wanted to include film clips in his lecture from various films that influenced his creative work, the DMCA law would have prevented him from circumventing encryption to create clips to use in his lecture. Libraries offer rich educational programs that serve the American public. Limitations like this just don’t seem right.

3. Opponents do not acknowledge that educational fair use is evolving to be increasingly sensitive to the situation and context of the learning environment.

Opponents argue that our request is too broad and expansive and they recommend a definition that limits use to short clip compilations for film analysis, comment and criticism. But this definition is far too narrow; an exemption written to include only these practices would likely have a harmful effect on education, increasing confusion and reducing innovation among educators and learners in libraries, museums and non-profit organizations.

Teaching and learning is a highly variable practice; situational variation is necessary for education to be responsive to the specific contexts of informal education. More important, because digital media is changing so rapidly, a robust spirit of experimentation by educators and learners is required in order to discover the value of these new tools and technologies in out-of-school learning contexts. Because informal learning reaches a broad range of Americans spanning significant geographic, social-economic and cultural differences, the range of instructional practices and strategies used by educators will inevitably be broad. It is in the public interest that educators be encouraged to be innovative in using digital media in ways that advance learning. A too narrowly-written

exemption will discourage the kinds of educational innovation that are desirable and beneficial to learners, and, ultimately to society.

4. There is no good reason to create separate rules for digital media in different formats. Digital media is constantly evolving. While in 2015, DVDs dominate the marketplace, this may not be true in 2017. Opponents use a divide-and-conquer strategy by elaborately distinguishing between media content in different formats and for use with different devices. The intent and spirit of the copyright law, its flexibility and responsiveness to changes in media, education and technology, does not warrant the creation of separate rules for different types of digital media. Elaborate new rules that create different exemptions for DVD, Blu-Ray and streaming media have the potential to create more confusion by creating an elaborate category system that treats media in different digital formats differently. Such a rule does not reflect the spirit of copyright law and would certainly discourage the innovative educational use of digital media in elementary and secondary schools. For these reasons, this exemption has been requested for audiovisual material made available in all formats, including DVDs protected by CSS, Blu-ray discs protected by AACS, and TPM-protected online distribution services.

5. Learner creative expression, regardless of context, is fully subject to the legal protection of copyright and fair use. Opponents' concern about the breadth of our proposed exemption is unwarranted. In particular, they note that we did not offer specific examples of learners or teachers harmed by the lack of exemption. Consider the work of **Jeannine Cook**, the lead educator for the Media and Technology Program at YESPHILLY, a non-profit organization that helps out-of-school African American youth ages 16 – 21 get their GED. Her students have had negative experiences in traditional schools and can be resistant to traditional practices of teaching and learning, so she finds creative ways to engage students with media in ways that stimulate intellectual curiosity. In one activity she uses where learners use digital media for "I am..." poetry videos, she knows that learners may wish to incorporate clips from culturally-relevant contemporary films like *Unbroken* and *Selma*, two of many films which are only available on DVD and Blu-Ray. But these clips are legally unavailable to her learners; they cannot re-purpose short excerpts to create a new, transformative work. If only her young adult learners were students at the nearby University of Pennsylvania, enrolled in a film class, *then* they would be entitled to the DMCA exemption and could circumvent encryption using these films to create their video poetry assignment. Sadly, under the current law and through the accident of being born poor and African-American, these learners are not entitled to use the copyrighted content of their culture in transformative ways for self-expression and learning. It just doesn't seem right.

Learner creative expression is fully subject to the law of copyright and fair use, as the law is not limited in its application to only to people enrolled in accredited school- or higher-education institutions. Right now, the DMCA has created a chicken-egg problem for educators: Learners need to access encrypted digital content in order to manipulate it to create new work that is transformative; yet, without the ability to legally access the work, they cannot create new works. Unless learners can access encrypted digital content, they cannot engage in the kinds of manipulation and creative work that are needed in order to

make transformative works.

6. Opponents have narrowly formulated ideas about length and brevity of copyrighted content that do not reflect the spirit of copyright law. In particular, courts have established that educators should have the ability to determine the amount and length of work necessary to accomplish a particular educational purpose. In *Cambridge Univ. Press v. Patton*,³ the U.S. Court of Appeals for the 11th Circuit found that professors' sharing of excerpts from copyrighted works with learners in their courses "is of the nonprofit educational nature that Congress intended the fair use defense to allow under certain circumstances."⁴ Hard numerical limits of the appropriate amount of work used – in particular the idea that works must be "short" or "brief" -- were recognized in this case to be legally inappropriate. Instead, the court explained that lawful, noninfringing uses must simply be well-aligned and proportional to the instructor's particular instructional objectives. One of the reasons why elementary and secondary educators and learners need an exemption to circumvent digital content in all its forms comes from the strong alignment between the pedagogy of digital and media literacy and the concept of transformative use. Learners and educators both need to have access to digital content in order to make transformative use of copyrighted content for learning purposes. Transformative uses "lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright."⁵

7. Opponents understate the importance of image quality for teaching and learning. They use a legal argument to claim that fair use does not require the use to be technologically convenient. But for many learners, access to high quality images is needed in order for a lesson to accomplish its pedagogical goals. Image quality increases viewers' sense of psychological involvement with media. For example, when we are teaching learners about how "the media is the message," we sometimes want learners to experience how the format itself can shape emotional response. In other situations, educators need highest-quality images simply in order for the content to be usable, as we have previously demonstrated that the quality of the classroom environment, with the differences in projection screens, light leakage and other factors affect learner response. Also, the diminished quality of sound is a substantial liability for classroom use. Degraded sound and image quality may affect learner engagement, which can then result in decreased learning. The Copyright Office will recall that in 2012, social studies educator Spiro Bolos demonstrated the results of an experiment he conducted with learners at New Trier High School in Evanston, Illinois, where he found that the quality of learner discussion was improved when learners conducted a close analysis of a high-quality clip as compared with a screencast version.

8. Screen capture also does not suffice to meet the full range of educational needs of educators or learners. In particular, screen capture does not offer educators the flexible use of closed captioning or language tracks that are available on DVDs or Blu-Ray discs.

³ 769 F.3d 1232 (11th Cir. 2014).

⁴ 769 F.3d 1232 (11th Cir. 2014).

⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

Closed captioning is a powerful tool for advancing learners' reading comprehension. Same language subtitling (SLS) is the instructional practice of using captioned videos to encourage reading and increase reading proficiency. Learners are able to hear the words being spoken and read the words being spoken at the same time. The use of entertainment media with closed captioning in the K-12 classroom has been shown to dramatically increase learners' reading comprehension.⁶ For poor people and new immigrants, in particular, library-based programs in digital literacy can help advance literacy offer a path out of poverty.

Screen capture and media streaming alternatives do not meet the needs of all educators or learners. Opponents of our exemption claim that screen capture and media streaming provide adequate alternatives to circumvention. But these tools, while valuable, have some important limitations that differentially affect out-of-school learners. Apart from the degraded image quality, many educators do not have not have the most up-to-date hardware or software or cannot afford the cost of the fee-based screen capture tools. Screencasting simply doesn't work to capture all forms of digital media. Opponents do not acknowledge what we have previously documented: that screencasting does not always work when using encrypted DVDs, Blu-Ray discs, Netflix, Amazon Prime, Roku, Hulu Plus, or other streaming services.

9. Media streaming platforms do not replace the need for circumvention in all cases.

Streaming platforms, while valuable, should not be considered a substitute for the need for circumvention of a variety of forms of digital media content. Streaming media often have steep fees that limit access. For example, non-profit educators cannot afford access to Discovery Education streaming media, which may cost as much as \$10,000 or more annually. Even for paying customers, access is limited as the license contract may limit the ability of learners or educators to use clips to create learner-produced media projects. For this reason, librarians and non-profit educators have recognized that streaming media may position learners in a "receive only" mode, thus limiting the new forms of active, hands-on, minds-on creative learning that digital literacy requires. Plus, educators in rural and urban communities may not be able to count on high-speed Internet access that streaming media requires. Streaming media offers a limited selection of content and often includes advertisements that can interfere with the learning experience. For all these reasons, educators and learners need to be able to access the content of digital media on DVDs, Blu-Ray discs and other high definition content.

10. The use of copyrighted materials for digital and media literacy education is inherently a transformative use. Media literacy educators have long recognized that transformative use is an essential dimension of this particular approach to teaching and learning. That is why they developed the *Code of Best Practices in Fair Use for Media*

⁶ Kothari, B., & Bandyopadhyay, T. (2014). Same language subtitling of Bollywood ^aIm songs on TV: Effects on literacy. *Information Technologies & International Development*, 10(4), 31-47

*Literacy Education in 2007.*⁷ In particular, media literacy education emphasizes the critical analysis of works of entertainment, news, advertising and popular culture as a way to deepen critical thinking, reflect on how values are transmitted through media, and connect home and classroom. The vast majority of audiovisual works in circulation were not intended for classroom use but have much value when used for educational purposes. As a means of learning, learners critically analyze entertainment media and then create something new with it, manipulating “quoted matter,” using it “as raw material transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.”⁸ In our view, opponents to our exemption trivialize and dismiss the significant benefit that such educational use offers to society.

Consider the case of **Nuala Cabral**, a media arts educator who runs a small non-profit organization in Philadelphia called FAANMail. FAAN Mail offers workshops, presentations and professional development around media literacy, social media activism and creating media for social change. In one project, Cabral works with members of the African American community to create “video talk backs” where she encourages people to respond to some of the misogynistic representations in contemporary media. For example, a group of people gather to view and discuss Rick Ross’ music video, “Hold Me Back: Nigeria.” The video includes clips of the video along with comments and dialogue from people who raise questions about the concept of a global ghetto, capitalism and exploitation, and artists’ responsibility and accountability in the hip hop industry. Cabral would like to be able to create FAANMail video where community members analyze and comment on *Orange is the New Black: Season 2* on Blu-Ray. Sadly, she is legally unable to bypass encryption to access the clips. This kind of creative educational outreach work is an essential practice of digital and media literacy education that should be protected under fair use. It is important for all citizens to strengthen the ability to critically analyze and create media.

For all these reasons, we disagree with opponents who believe our exemption is too broad. However, if limiting language is deemed necessary by the Copyright Office in order for our exemption to be successful, we suggest that the exemption be limited to enable circumvention for *digital and media literacy instructional practices in informal learning contexts*. This narrower language would include the full range of educational practices that support the development of people’s digital and media literacy competencies, including the ability to access, analyze, and create messages using digital texts, tools and technologies.

11. Educators support learners in informal learning contexts to make lawful, transformative work and discourage infringing uses. Educators have a deep interest in encouraging learners’ lawful behavior. Because they are learning, and learning sometimes involves making mistakes, some learners may create works that are infringing,

⁷ Media Education Lab, Program on Information Justice and Intellectual Property, and Center for Media and Social Impact (2007). *Code of Best Practices in Fair Use for Media Literacy Education*. Available: <http://www.cmsimpact.org/fair-use/related-materials/codes/code-best-practices-fair-use-media-literacy-education>

⁸ Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990).

many others will create work that is transformative. One of the ways that learners learn best is through hands-on experience, guided by educators who help them develop reasoning and analysis skills. We have found that learners of all ages, with appropriate support, can learn to apply the four-factor test to analyze whether a particular use of copyrighted material is likely to be infringing or lawful. In fact, educators are increasingly active in seeking to develop their understanding of copyright and fair use. In Fall 2014, more than 700 educators enrolled in an MOOC (massively online open course) offered on the Canvas Network to develop their own knowledge about how to support learner learning of their rights and responsibilities under copyright law in a digital era.⁹ Online learning and discussion boards like the Copyright Confusion wiki demonstrate that educators are educating themselves and helping learners to understand how to create digital media that is noninfringing.¹⁰ Educators who use digital tools, texts and technologies have created and now use a variety of curriculum materials to help teach about learners' rights and responsibilities under the law. The exemption offered to K-12 educators in 2012 did not have any demonstrated negative impact on copyright holders and we do not anticipate any to occur when learners and educators in out-of-school contexts have the legal right to bypass encryption for fair use purposes. For these reasons, opponents' concern about the breadth of our exemption is unwarranted.

12. An exemption for learners and educators in libraries, museums and non-profit organizations does not harm the economic interests of media industries or technology providers. Opponents conclude their argument by presenting a classic legal double bind: they first imply that abuses occurred if learners were engaged in circumvention and they then suggest that no exemption is needed if learners did make use of screen capture. This superficial ploy trivializes the importance of the DMCA 1201 process in supporting the innovative uses of digital media in the context of elementary, secondary and higher education. It's worth noting that opponents provide no evidence to show that the DMCA 2012 exemption to K-12 educators has led to any abuse or harm to the industry. We do not expect the exemption applied to educators and learners in libraries, museums and non-profit organizations will cause any harm. For these reasons, an exemption should be provided to allow learners and educators in libraries, museums and non-profit organizations to circumvent access controls on lawfully made and acquired motion pictures and other audiovisual material made available in all formats, including DVDs protected by CSS, Blu-ray discs protected by AACS, and TPM-protected online distribution services.

⁹ <https://www.canvas.net/courses/copyright-clarity>

¹⁰ <http://copyrightconfusion.wikispaces.com/>